(2)

No. 99-449

Supreme Court, U.S.
NOV 15 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—v.—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ACROW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER and HERBERT PARDES, in His Official Capacity of Head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PATRICIA D'ALVIA
Counsel of Record
MARTIN, CLEARWATER & BELL
220 East 42nd Street
New York, New York 10017
(212) 697-3122

Attorneys for Respondents

3698

LIST OF PARTIES

The names of the parties in the proceeding in the Court whose judgment is sought to be reviewed are as follows:

Petitioner

Rhoda Okunieff

Respondents

Anne Skomorossky, M.D.
Lorrainer Innes, M.D.
Stan Arcow, M.D.
Elizabeth Mirabello, M.D.
Jane Doe
Columbia Presbyterian Medical Center
Herbert Pardes, In His Official Capacity as Head of the Department of Psychiatry of Columbia Presbyterian Medical Center

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

I. THE REASONS BY THE WRIT SHOULD BE DENIED 2

State Compulsion Test 2

Public Function Test 6

Nexus/Joint Action Test 9

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS 11

III. PETITIONER HAS AN ADEQUATE STATE REMEDY AND A FUNDING OF STATE ACTION IS BOTH UNNECESSARY AND DETRIMENTAL 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Federal Cases

Addington v. Texas,
441 U.S. 418, 431-32, 99 S.Ct. 1804,
60 L.Ed.2d 323 (1979) 12

American Manufacturers Mutual
Ins. Co. v. Sullivan,
526 U.S. 40, 119 S.Ct. 977, 988,
143 L.Ed.2d 130 (1999) 12, 13, 17, 18

Blum v. Yaretsky,
457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)
..... 2, 3, 9, 10, 12

Community Medical Center v. Emergency Services of
Northeastern Pennsylvania, Inc.,
712 F.2d 878 (3d Cir. 1983) 15

Cunningham v. Southlake Center
For Medical Health,
924 F.2d 106, 109 (7th Cir.1991) 5

Ellison v. A.J. Garbarino, M.D.,
48 F.3d 192 (6th Cir. 1995) 2, 11

Flagg Brothers Inc., v. Brooks,
436 U.S. 149, 158, 98 S.Ct. 1729,
1734, 56 L.Ed.2d 185 (1978) 7

Harvey v. Harvey,
949 F.2d 1127 (11th Cir. 1992) 10, 11

Jackson v. Metropolitan Edison Co.,
419 U.S. 345, 352, 95 S.Ct. 449,
454, 42 L.Ed.2d 477 (1974) 7, 10, 12, 15

Janicsko v. Pellman,
774 F.Supp 331 (M..D. Pa. 1991),
aff'd w/o opinion, 970 F.2d 899 (3d Cir. 1992) . . . 11

Lugar v. Edmonson Oil,
457 U.S. 922, 929, 102 S.Ct. 2744,
73 L.Ed.2d 482 (1982) 10

Okunieff v. Rosenberg,
166 F.3d 507 (2d Cir. 1999) 16, 17

Pino v. Higgs,
75 F.3d 1461 (10th Cir. 1996) 11

Polk County v. Dodson,
454 U.S. 312, 102 S.Ct. 445,
70 L.Ed.2d 509 (1981) 4, 6

Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 2-4, 7, 9

Rockwell v. Cape Cod Hospital,
26 F.3d 254 (1st Cir. 1994) 7, 9, 11, 12

Rubenstein v. Benedictine Hosp.,
790 F.Supp. 396 (N.D.N.Y. 1992) 16

Ruffler v. Phelps Memorial Hospital,
453 F.Supp. 1062 (S.D.N.Y. 1978) 16

S.P. v. City of Takoma Park, Md.,
134 F.3d 260 (4th Cir. 1998) 11

Sherlock v. Montefiore Medical Center,
84 F.3d 522 (2d Cir. 1996) 5

Snyder v. Albany Medical Center,
206 A.D.2d 816, 615 N.Y.S.2d 139
(3d Dept. 1994) 16

Spencer v. Lee,
864 F.2d 1376, 1380-81 (7th Cir. 1989),
cert. denied 494 US 1016,
110 S.Ct. 1317 (1990) 7, 9, 11, 12

West v. Atkins,
487 U.S. 42, 108 S.Ct. 2250,
101 L.Ed.2d 40 (1988) 4, 5, 10

State Cases

People v. Kin Kan,
78 N.Y.2d 54, 574 N.E.2d 1042,
571 N.Y.S.2d 436 (1991),
reargument denied 78 N.Y.2d 1008,
580 N.E.2d 1061, 547 N.Y.S.2d 458 (1991)..... 15

Statues and Regulations

42 U.S.C. §1983 ..... 12, 13, 17, 18

New York Mental Hygiene
(McKinney's Cons. Laws of NY, 1966)
§7.01 ..... 2, 3, 9, 10, 12

§7.07 ..... 2, 11

§9.27 7

§9.31 ..... 10, 11

§9.39(a) 7, 10, 12, 15

§31.02(a)(2) 15

§31.04(a)(4) 5

Other Authorities

Albert Deutsch, *The Mentally Ill In America: A History of Their Care and Treatment From Colonial Times*, 40 (2d Ed. 1949) 16, 17

Henry M. Hurd, *The Institutional Care of the Insane in the United States*, Vol. I, 27 (Johns Hopkins Press 1916) 11

Lawrence C. Kolb, M.D. &
H. Keith H. Brodie, M.D.,
Modern Clinical Psychiatry,
(10th Ed. 1982) 4, 6

IN THE

SUPREME COURT OF THE UNITED STATES

No. 99-449

RHODA OKUNIEFF,

Petitioner,

against

ANNE SKOMOROSSKY, M.D., personally,
LORRAINE INNES, M.D., personally,
STAN ACROW, M.D. personally,
ELIZABETH MIRABELLO, M.D., personally,
JANE DOE, personally,
COLUMBIA PRESBYTERIAN MEDICAL CENTER
and HERBERT PARDES, in His Official Capacity of
Head of the Department of Psychiatry of
Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request that Petitioner's request, for a writ of *certiorari* to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit, be denied.

THE REASONS WHY THE WRIT SHOULD BE DENIED

I. THE OPINIONS BELOW ARE CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT

State Compulsion Test

Pursuant to Supreme Court Rule 10, this Court can consider whether a United States Court of Appeals has decided an important federal question in a way that conflicts with the relevant decisions of this Court, when determining whether to grant certiorari. To meet this standard, the plaintiff-petitioner claims that the private conduct of the defendants-respondents should be converted into state action because New York State "created the legal framework" governing civil commitment (p. 15, Petitioner's Brief) and because the defendants-respondents hospitalized Ms. Okunieff involuntarily pursuant to a state statute (New York Mental Hygiene Law §9.27). This is merely a distortion of the state compulsion test, misapplied, which requires proof that the state significantly encouraged or coerced the private party to act, so that the private party's actions were effectively those of the state. See *Ellison v. A.J. Garbarino, M.D.*, 48 F.3d 192 (6th Cir. 1995).

On the contrary, this Court has expressly found that under circumstances such as this case - where the sole criterion is private medical judgment - there is no such state coercion. See *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); see also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (decision to terminate a teacher was not state action because the decision was based on discretionary judgment,

independent of State influence). Although the Mental Hygiene Law provides the legal framework under which physicians may involuntarily hospitalize a patient by creating procedures and standards for commitment, what is critical is that the statute leaves the decision to hospitalize a patient to a physician's discretion. See *Blum v. Yaretsky*, *supra*; *Rendell-Baker v. Kohn*, *supra*.

In *Blum v. Yaretsky*, for example, private nursing home officials discontinued plaintiffs' Medicaid benefits because plaintiffs refused to be transferred to another health care facility. This Court found that New York State's social service regulations did not demonstrate that the State was responsible for the decision to discharge or transfer patients due to the discretion left to the private physicians. The decisions to transfer patients "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* 457 U.S. at 1008, 102 S.Ct. at 2788. Accordingly, this Court clearly held that the decision to transfer Medicaid patients to lower levels of care was not coerced by the State and did not constitute state action under 42 U.S.C. §1983, even though the entire Medicaid "legal framework", governing all aspects of the care, was pursuant to statute.

Like the New York State constitutional provision at issue in *Blum v. Yaretsky*, *supra*, New York Mental Hygiene Law §7.01 simply does not mandate the provision of any particular care. Moreover, as in *Blum*, the Mental Hygiene Law allows the private actor to use his or her discretion. Therefore, a finding that the defendant-respondents were not state actors when Ms. Okunieff was involuntarily hospitalized is consistent with established Supreme Court precedent.

Similarly, in *Rendell-Baker v. Kohn*, *supra*, this Court found that although a private school was generally subject to extensive state regulation and received extensive state funding, the regulations and funding did not influence the school's decision to terminate the plaintiff, a teacher at the school. The Court held that the decision to terminate the plaintiff-teacher did not constitute state action under 42 U.S.C.§1983 because the decision to terminate the teacher was merely defendants' private decision and the State had no role in it.

Plaintiff-petitioner's reliance on *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), and *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) is unavailing, as *West* involved prisoners, who were wards of the state, and *Polk* involved state employees, not private individuals. Because of these distinctions, the holdings in these cases do not apply to the case at bar.

A true examination of *Polk County* reveals that this Court distinguished a public defender who is paid by the state from both an administrator of a hospital and a physician in a prison hospital. This Court held that because the public defender works under the same standards of competence as a private lawyer and uses professional judgment, the lawyer is not a state actor even if he is working on behalf of the state. The discussion in *Polk* regarding physicians' activities is limited to state employees, such as a prison physician and an administrator of a state hospital, and is therefore not material to the instant case. Certainly, *Polk* does not support plaintiff-petitioner's contention that the private defendant-respondents are state actors.

Similarly, plaintiff-petitioner's reliance on *West*, is misplaced, because it was decided in the context of providing

medical treatment to prisoners. This Court in, *West*, carved out the very narrow exception that a private party will be held a state actor for providing medical care to prisoners in custody. This is not inconsistent with defendant-respondents' argument herein. In *West*, this Court found that a private physician, who was under contract with the state to provide medical care to a prison inmate, was a state actor despite the fact that the physician's challenged activity turned upon medical judgments. This Court reasoned that the physician within the state prison performed a public function reserved to the state: to provide medical care to inmates. This Court recognized that "because West was a prisoner in 'close custody' he was not free to employ or elect to see a different physician of his own choosing." 487 U.S. at 51. This Court pointed out that "although the provision of medical services is a function traditionally performed by private individuals, the context in which respondent performs these services for the State...distinguishes the relationship between respondent and West from the ordinary physician-patient relationship". *Id.* at 56, n. 15.

The rationale behind the *West* decision is that an inmate must rely entirely on prison authorities for medical treatment and is, in fact, forbidden to seek medical attention elsewhere; therefore, in such cases, health care is the exclusive prerogative of the state which cannot be delegated to a private institution. *Id.* at 55; see also *Cunningham v. Southlake Center For Medical Health,* 924 F.2d 106, 109 (7th Cir.1991); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522 (2d Cir. 1996).

Unlike a prisoner, a private citizen has numerous choices for health care, whether it be private or controlled by the state. Plaintiff-Petitioner's contention that Presbyterian Hospital serves as a catchment area for involuntary admissions

does not constitute state action because the private citizen is free to seek medical care elsewhere. The concept of a catchment area only speaks to a hospital's geographic location and not to the basis of the medical decisions made for a plaintiff's benefit.

It does not follow that because private physicians who are contracted to provide medical care to prisoners, who are wards of the state, can be held to be state actors, so too must private physicians who provide treatment to citizens who are not wards of the state. Otherwise, all private physicians' independent medical decisions would become actions attributable to the state. Instead, the defendants-respondents are similarly situated as the lawyers in *Polk* were, who exercised their professional judgment and were held to the standards of the canons of professional responsibility and the competence of other lawyers. In *Polk*, one would believe a public defender was a state actor being paid by the state, but in fact, this Court held that the public defender was not a state actor because the attorney relied on his own professional judgment.

Public Function Test

Contrary to plaintiff-petitioner's contentions, the Courts below did not misapply the public function test. Although plaintiff-petitioner contends that state action exists pursuant to the public function test, and that the decisions in the Courts below are inconsistent with the decisions previously rendered by this Court, the decisions in the Courts below are actually entirely consistent with the application of the public function test as previously applied by this Court.

In order to convert private action into state action under the public function test, it is not enough to show that the private actor performed a public function. The plaintiff must prove that the private entity assumed functions "traditionally *exclusively* reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974) (emphasis added); see also *Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. at 2770 ("[w]e have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" (emphasis in original, citing *Jackson, supra*). In *Flagg Brothers Inc., v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978) this Court restricted a broad interpretation of the public function test and stated that "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." The fact that the private party is serving a "public function" is immaterial, and will not trigger 42 U.S.C. §1983 liability. *Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. at 2772 (holding that education is a public function, but not the exclusive prerogative of the state).

History is extremely relevant regarding whether a given activity was an exclusive sovereign function. See *Rockwell v. Cape Cod Hospital*, 26 F.3d 254 (1st Cir. 1994); *Spencer v. Lee*, 864 F.2d 1376, 1380-81 (7th Cir. 1989) (historical analysis demonstrated that involuntary commitment was not a traditional public function). In the case at bar, history demonstrates that involuntary commitment has not been exclusively performed by the State of New York, and thus is not a traditional public function.

As Judge Sweet determined, involuntary treatment and confinement of the mentally ill in New York originated in private homes, and later took place in both private and public

institutes. Even today, both private and public institutions and individuals share responsibility for the involuntary confinement and treatment of the mentally ill. Families, friends and guardians have cared for the mentally ill privately since the beginning of the United States. Henry M. Hurd, *The Institutional Care of the Insane in the United States*, Vol. I, 27 (Johns Hopkins Press 1916) (hereafter "Hurd"). Mentally ill persons who had relatively well-to-do families or friends were usually cared for in their own homes. Albert Deutsch, *The Mentally Ill In America: A History of Their Care and Treatment From Colonial Times*, 40 (2d Ed. 1949) (hereinafter "Deutsch", JA 332-349). If violent or troublesome, mentally ill persons were locked up and chained by their families in strong-rooms, cellars, attics, and even outhouses.

New York State also was the home of the first private, for-profit, institutions to treat the mentally-ill in the United States. Hurd, *supra*. As of 1890, Sanford Hall on Long Island had been in operation for nearly half a century. Brigham Hall had been organized and opened in 1855 by Dr. George Cook in Canandaigua, New York. *Id.* Both institutions were under private ownership. *Id.*

In his decision, Judge Sweet specifically noted (26a-27a):

> Private institutional care predated public institutional care, as it was not until 1842 that laws were passed to erect the first state institution in New York [citation omitted]. The earliest movement toward complete state care did not come until the second half of the nineteenth century [citation omitted]. In 1874, New York passed a law authorizing any asylum, public or private, institution, home, or retreat

> that cared for the mentally ill, without court order, to commit for five days any person upon the certificates of two physicians [citation omitted].

Today, responsibility for the treatment and care of the mentally ill is shared between private and public institutions. Although New York State and its local governments have a responsibility for the care of mental illness, New York Mental Hygiene §7.01 (McKinney's Cons. Laws of NY, 1966), the Mental Hygiene Law permits private institutions to care for the mentally ill. See New York Mental Hygiene §9.01 *et seq.* These private institutions, such as Presbyterian Hospital, The New York Hospital, Mount Sinai Hospital and Gracie Square Hospital, play a pivotal role in providing involuntary care. See generally Lawrence C. Kolb, M.D. & H. Keith H. Brodie, M.D., *Modern Clinical Psychiatry*, (10th Ed. 1982) 151-52 (discussing the rise of short-term hospitalizations in the psychiatric services of general hospitals).

Thus, this Court should follow the Supreme Court decisions of *Blum* and *Rendell-Baker* and the recent decisions of several sister circuits, which considered whether involuntary commitment is an exclusive prerogative of the state, and held that it is not. See, e.g., *Rockwell*, 26 F.3d at 258-59; *Spencer v. Lee*, 864 F.2d at 1380-1381.

Nexus/Joint Action Test

Plaintiff-petitioner notes that Sections 31.02(a)(2), 31.04(a)(4) and 7.07 of the New York Mental Hygiene Law prohibit a hospital from operating a psychiatric ward unless it receives a certificate of operation from the State Office of

Mental Health, and that a private hospital must serve a catchment (*i.e.*, geographical) area for involuntary psychiatric admissions as a condition of renewal of an operating certificate. Plaintiff-petitioner argues that because these statutes require general hospitals to assume primary responsibility for emergency psychiatric admissions, an activity that the State would otherwise assume, the opinion below creates a situation in which mentally ill individuals lack a federal remedy where there has been a misuse of power because the hospital is "clothed with the authority of state law." *Lugar v. Edmonson Oil*, 457 U.S. 922, 929, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Citing *West v. Atkins*, 487 U.S. 42, 56, n.14, 108 S.Ct. 2250, 101 L.Ed.2d. 40 (1988), petitioner argues that the decision below "impermissibly enables" the state to contract out, or otherwise delegate, its constitutional responsibilities, while simultaneously depriving individuals of a constitutional remedy.

Although plaintiff-petitioner uses different terminology, she is essentially arguing that the Hospital and physicians should be deemed state actors under the joint action/nexus test. A private individual can be deemed a state actor when there is a sufficiently close nexus between the state and the challenged action of the private individual, so that the individual's action may be fairly attributed to the State. *Jackson v. Metropolitan Edison Co., supra.* This requirement ensures that constitutional standards are invoked only when the State is responsible for the specific conduct of which the plaintiff complains. *Blum v. Yaretsky, supra.* Actions of a private party satisfy the nexus test only when the state government jointly participates with the private party to deprive the plaintiff of her constitutional rights. *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992).

The critical aspect to these cases is that for State action to exist, there must be a nexus between the State and the challenged action of the private party (i.e., a connection between the State and the *specific conduct* that is alleged to be State action). In the case at bar, the specific conduct is the involuntary hospitalization and treatment of Ms. Okunieff. The statutes and regulations to which the plaintiff-petitioner refers in her Petition (pp. 23-25) do not specifically relate to involuntary hospitalization or treatment. For example, the concept of a catchment area only speaks to a Hospital geographic location and not to the basis of the medical decisions made for plaintiff-petitioner's benefit. Therefore, the existence of these regulations cannot serve as a basis for finding state action in this case.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS

Pursuant to Supreme Court Rule 10, when determining whether to grant certiorari on an important federal question, this Court can consider whether a United States Courts of Appeals has entered a decision in conflict with the decisions of other United States Courts of Appeals. In this case, the Circuit Courts of the United States that have considered the issue have unanimously held precisely that civil commitment by private physicians does not constitute state action. See *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Pino v. Higgs*, 75 F.3d 1461 (10th Cir. 1996); *Ellison v. Garbarino*, 48 F.3d 192 (6th Cir. 1995); *Rockwell v. Cape Cod Hospital*, 26 F.3d 254 (1st Cir. 1994); *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992); *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989); *Janicsko v. Pellman*, 774 F.Supp 331 (M..D. Pa. 1991), *aff'd w/o*

opinion, 970 F.2d 899 (3d Cir. 1992). Therefore, Judge Sweet's decision, affirmed by the Second Circuit, is consistent with the decisions rendered by other Courts of Appeals.

Although plaintiff-petitioner's counsel accurately notes that the decisions of the Courts of Appeals in these cases reversed a trend in which numerous District Courts had found that civil commitment by a private actor is state action, he incorrectly concludes that there is a lack of clarity in state action jurisprudence and that there is a need for "guidance." As seen by the cases cited *supra*, the Courts of Appeals have uniformly concluded that civil commitment does not constitute state action. To the extent these decisions conflict with some of the decisions rendered by the District Courts, it is respectfully submitted that the Circuit Courts have effectively reversed the decisions rendered by the District Courts and therefore have *already* clarified the law in this area such that there is no need for review by this Court.

Plaintiff-petitioner's references to decisions rendered by the State Courts, and her entreaty that this Court grant certiorari to resolve conflicts among them, are misplaced. One of the tests to determine whether state action exists is the public function test. Under this test, the private party must perform a function that is "traditionally the exclusive prerogative of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1005, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 [1974]). History is extremely relevant regarding whether a given activity was an exclusive sovereign function. See *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 988, 143 L.Ed.2d 130 (1999) (reviewing Pennsylvania's approach, historically, towards workers' compensation claims); *Rockwell v. Cape Cod Hospital*, 26 F.3d 254, 258-59 (1st Cir. 1994); *Spencer v. Lee*, 864 F.2d 1376,

1380-81 (7th Cir. 1989), *cert. denied* 494 US 1016, 110 S.Ct. 1317 (1990) (historical analysis has demonstrated that involuntary commitment was not a traditional public function); see also discussion, *infra*. The Courts which have applied this test, not only to the issue of civil commitment, but also to other private activities, have examined the legislative and social history of a given activity in relation to the State in which that activity took place. See, e.g. *Sullivan, supra*. Consequently, the historical analysis will differ from State to State. Judge Sweet recognized this in his decision (26a). The different conclusions drawn by some courts do not reflect a lack of clarity on state action jurisprudence, or the need for guidance, but rather, reflect the different historical circumstances among the States.

These diverse circumstances should not be disregarded, but respected. Each State should be able to rely on its own historical experience when determining whether a given activity meets the public function test. Therefore, a uniform rule from this Court is not necessary and would, in fact, abrogate the public function test.

III. PETITIONER HAS AN ADEQUATE STATE REMEDY AND A FUNDING OF STATE ACTION IS BOTH UNNECESSARY AND DETRIMENTAL

Private medical care issues - the heart of which is the professional medical judgment of physicians - are not regulated by the State and as such, are exclusively the province of medical malpractice and civil law. Absent control, joint action or the exercise of an exclusive public function by the State, there is no constitutional issue under 42 U.S.C. §1983.

Plaintiff-petitioner is attempting to create a constitutional issue out of a medical malpractice case. Breaches of the standard of care by private physicians, as alleged herein, do not constitute constitutional violations. As recognized by the Courts below, the defendants-respondents, private physicians and a private entity, are shielded from liability, under 42 U.S.C. §1983, because they are private individuals who exercised independent medical and psychiatric judgment which the law has held to be "private" conduct. As such, they are not state actors. If a patient believes he or she were hospitalized improperly, there is a remedy under state medical malpractice law. Constitutional constraints, therefore, are not required. To the contrary, such a finding would subject every medical judgment finding regarding involuntary admission (or a decision against admission) to federal court review. This would by-pass the structure already in place in State Courts and place an enormous unnecessary burden on the federal resources.

Contrary to petitioner-plaintiff's arguments, holding that civil commitment does not constitute state action would not permit mentally ill individuals to be hospitalized involuntarily without due process protection. These protections are incorporated into the New York Mental Hygiene Law, as this Law puts in place procedural due process safeguards for the benefit of those who may require temporary retention. Section 9.27 of New York's Mental Hygiene Law states:

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission for such person. The examination may be conducted

jointly but each examining physician shall execute a separate certificate.

New York Mental Hygiene Law, §9.27(a) (McKinney's 1996) (emphasis added).

Indeed, to justify involuntary hospitalization, this Court has held that due process requires that the state establish, by clear and convincing evidence, that the civil committee suffers from mental illness and poses a danger to herself or others. See *Addington v. Texas*, 441 U.S. 418, 431-32, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). This standard is incorporated into the New York Mental Hygiene Law and therefore the patient is afforded due process protection. See New York Mental Hygiene Law §9.39(a) (McKinney's 1996).

More importantly, Section 9.31 of the New York Mental Hygiene Law permits a patient to challenge her confinement and request a hearing on the propriety of the admission. Here, the plaintiff-petitioner actually invoked this provision of the statue to effectuate her release. Not only does the Mental Hygiene Law provide due process, but also, plaintiff-petitioner's own actions demonstrate that it works. Plaintiff-petitioner's arguments regarding the acts which the New York State Office of Mental Health might commit in the future have no bearing on the issue under consideration and, in essence, plaintiff-petitioner is asking for prospective relief.

It is respectfully submitted that the finding of state action in the context herein would deprive the private physicians and the Hospital of the protection inherently established by the Supreme Court cases and federal statutes which guard against the impermissible reach of federal law. See *Jackson v. Metropolitan Edison Co., supra*; *Community*

Medical Center v. Emergency Services of Northeastern Pennsylvania, Inc., 712 F.2d 878 (3d Cir. 1983). Moreover, the protection from 42 U.S.C. §1983 liability affords private physicians and the Hospital the freedom to perform their independent medical judgment without fearing the reach of the state.

By holding that the defendants-respondents are state actors, it is respectfully submitted that the Court would be holding that all private physicians' decisions made in private hospitals are actions attributable to the state. This is because all private hospitals, nursing homes and physicians are highly regulated by the state in all aspects of care, including the use of restraints, dealing with Medicaid protocols, health codes, etc. Such regulation, including state regulation alleged by plaintiff-petitioner herein, is not intended to expose the daily medical decisions of private physicians and private hospitals to the reach of federal law, but rather to provide protection to the individual patients.

Plaintiff-petitioner's fear, that individuals in New York who have suffered violations of their constitutional rights because they were involuntarily hospitalized will turn to State Courts to file 42 U.S.C. §1983 actions in the absence of a federal remedy, is unfounded. In *Snyder v. Albany Medical Center*, 206 A.D.2d 816, 615 N.Y.S.2d 139 (3d Dept. 1994), cited by plaintiff-petitioner in support of this proposition, the New York Appellate Division, Third Department, relied heavily upon the District Court decisions in *Rubenstein v. Benedictine Hosp.*, 790 F.Supp. 396 (N.D.N.Y. 1992) and *Ruffler v. Phelps Memorial Hospital*, 453 F.Supp. 1062 (S.D.N.Y. 1978). To the extent that these decisions were effectively overruled by the Second Circuit's decision in *Okunieff v. Rosenberg*, 166 F.3d 507 (2d Cir. 1999), the

decision in *Snyder* would no longer be reliable and therefore would not serve as a basis for forum shopping. Although the decision, in *Okunieff,* is not binding on the New York State Courts, it is certainly persuasive authority, particularly when it undermines the federal decisions on which the state decision is based. See *People v. Kin Kan*, 78 N.Y.2d 54, 574 N.E.2d 1042, 571 N.Y.S.2d 436 (1991), *reargument denied* 78 N.Y.2d 1008, 580 N.E.2d 1061, 547 N.Y.S.2d 458 (1991).

Plaintiff-petitioner argues (Brief, pp. 13-14) that granting her petition for certiorari would permit this Court to address "the role of the State when an individual suffers a deprivation of rights" because to date, when addressing the state action issue, this Court has only examined the role of the government when an individual sought constitutional protection for the receipt of services. Plaintiff-petitioner fails to recognize, however, that the only issue that would be decided by this Court is whether the private defendants are, in fact, state actors (p. 13). The next question - whether there has been a constitutional violation - is not before this Court. Furthermore, the issue of whether there was substantive Due Process violation was not the subject of the decision rendered in the Courts below, and therefore plaintiff-petitioner's references to the Due Process Clause are inapposite.

Plaintiff-Petitioner's attempt to draw a distinction between the role of the State, when an individual suffers a deprivation of rights, and the role of the government, when an individual seeks constitutional protection for the receipt of services, and her attempt to characterize this Court's prior decisions as falling exclusively in the latter category (Brief, p. 13) are illusory. As this Court noted in *Sullivan, supra*:

> [Respondents argument] ignores our repeated insistence that state action requires both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'

Sullivan, *supra*, 119 S.Ct. at 985 (emphasis added) (citations omitted).

Clearly, then, the issue of state action has been considered in the context of an alleged deprivation of constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of *certiorari*.

Dated: New York, New York
November 12, 1999

Respectfully submitted,

PATRICIA D'ALVIA
Counsel of Record

MARTIN, CLEARWATER & BELL
220 East 42nd Street
New York, New York 10017
Tel. No.: (212) 697-3122
Counsel for Respondents

Of Counsel:
Gregory J. Radomisli
Peter T. Crean